

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC B. IVORY,

Defendant-Appellant.

UNPUBLISHED

November 17, 2000

No. 215203

Wayne Circuit Court

LC No. 98-001847

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to consecutive terms of twenty to forty years of imprisonment for the second-degree murder conviction and the mandatory five years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant's sole issue on appeal is that the prosecution failed to present sufficient evidence to support his second-degree murder conviction.

When determining whether sufficient evidence has been presented at a bench trial to sustain a conviction, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The elements of second-degree murder are: (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification or excuse. *People v Goeke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.*

Viewing the evidence in a light most favorable to the prosecution, we find that the prosecution presented sufficient evidence to establish the elements of second-degree murder beyond a reasonable doubt. The victim died on July 28, 1996, of multiple gunshot wounds to the face and buttock. The death of the victim was caused by defendant. Defendant shot the victim five to seven times with a handgun from a distance of approximately ten or twelve feet. After

being shot, the victim told a witness at the scene that defendant was the one who had shot her. In addition, defendant made a statement to police admitting that he shot the victim.

Further, in this case, there is sufficient evidence present for a rational trier of fact to find that defendant committed the killing with malice. Defendant shot at the victim five to seven times with a handgun from a distance of ten to twelve feet, hitting her in the face and buttock. Additionally, a witness testified that the victim was walking away from defendant when he shot at her and that the victim made no threatening gestures toward defendant. Under these circumstances, it could be reasonably inferred that defendant's act of shooting at the victim with a handgun five to seven times at fairly close range is an act done with high probability that it will result in death and that it was done with wanton disregard for human life and an antisocial motive. *Id.*, p 467.

We also reject defendant's argument that the trial court erred when it rejected a voluntary manslaughter verdict because there was a showing of adequate provocation. A homicide can be mitigated from murder to manslaughter if defendant kills in the heat of passion caused by adequate provocation, and before a reasonable time has passed for the blood to cool. *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346 (1991). Provocation is adequate if it would cause a reasonable person to lose control and act out of passion rather than reason. *Id.* pp 389-390. "The determination of what is reasonable provocation is a question of fact for the factfinder." *Id.* at 390. It was defendant's contention that this was an emotionally charged situation where he and the victim, who had been involved in a romantic relationship, had an argument the day of the shooting. Defendant claimed that during the course of the argument, the victim told him that she gave him the AIDS virus. Defendant claimed that he "lost it" when the victim left the car after defendant was told this. Yet, the trial court found that this was not a situation which would have caused an ordinary person to act out of passion. Moreover, the trial court found defendant's evidence of provocation unbelievable, self-serving, and uncorroborated by credible witnesses. In fact, part of defendant's version was directly contradicted by another witness. The trial court resolved the credibility issues and factual conflict issues in a manner that rejected any manslaughter claim. This was entirely within the trial court's purview since it was sitting as the fact finder. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

In this case, the trial court did not find adequate provocation to reduce murder to manslaughter and found that the prosecutor proved the elements of second-degree murder beyond a reasonable doubt. The trial court's factual findings reflect that defendant had the requisite state of mind, specifically, the intent to do great bodily harm, when he fired five to seven shots at the victim. Furthermore, it rejected voluntary manslaughter because it did not find honest, reasonable, or adequate provocation present. The trial court's findings are amply supported by the record.

There was also sufficient evidence presented to support a finding that defendant killed the victim without any justification or excuse. At the time of the shooting, the victim was walking on the sidewalk and defendant was in a car. The victim never made any gestures toward defendant such as swinging, punching, or throwing anything and she did not have anything in her hands, except possibly a purse. After observing the witnesses and hearing the testimony, the trial

court did not find that defendant was operating under an honest or reasonable belief that his life was in danger by the victim and rejected any claim of self-defense.

Accordingly, there was sufficient evidence presented for the trial court to find that defendant committed second-degree murder beyond a reasonable doubt.

Affirmed.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell